Written by **Warren Mass** on June 26, 2013

Supreme Court Declines to Rule on Texas Affirmative Action Case

In a 7-1 decision made on June 24, the Supreme Court declined to rule on the constitutionality of the affirmative action policy at the University of Texas and returned the case to the Fifth Circuit U.S. Court of Appeals. In handing down the decision, however, the High Court vacated the circuit court's previous decision and directed it to revisit the case and to apply a stricter level of scrutiny in deciding whether the university's affirmative policy is justified.

The case being considered, *Fisher v. University of Texas at Austin*, began in 2008 when the University of Texas rejected the admissions application of a Sugar Land high school senior, Abigail Noel Fisher. Fisher, who is white, sued the university, asserting that her application was evaluated differently from those of some less-qualified minority students who were accepted. The U.S. District Court for the Western District of Texas ruled in favor of the university, and the Fifth Circuit Court affirmed that decision, after which that decision was appealed to the Supreme Court.

CNN quoted UT's president, Bill Powers, who said the university was encouraged by the decision: "We remain committed to assembling a student body at The University of Texas at Austin that provides the educational benefits of diversity on campus while respecting the rights of all students and acting within the constitutional framework established by the court," said Powers.

The decision was written by Justice Anthony M. Kennedy, who was joined by Chief Justice John G. Roberts, Jr., and Justices Samuel A. Alito, Jr., Antonin Scalia, Clarence Thomas, Stephen G. Breyer, and Sonia Sotomayor. Roberts, Alito, Scalia, and Thomas are usually regarded as philosophically conservative members of the court, while Breyer and Sotomayor are considered to be quite liberal. Kennedy, a middle-of-the-roader, is often the "swing" vote on the court.

Surprisingly, the sole dissenter was Justice Ruth Bader Ginsburg, who is regarded as one of the more liberal members of the court. Another liberal justice, Elena Kagan, did not participate in the decision because she served as solicitor general in the Obama administration when the case was first appealed.

In writing the majority opinion, Kennedy, in parts, appeared to defend affirmative action: "The attainment of a diverse student body serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes."

However, Kennedy also placed limits on how far affirmative action should be used, writing that the university "must prove that the means chosen" to attain diversity "are narrowly tailored to that goal," and that the highest level of legal standard must be met before institutions use diversity programs.

"Strict scrutiny [of the affirmative action policy] imposes on the university the ultimate burden of demonstrating, before turning to racial classification, that available, workable race-neutral alternatives do not suffice," he noted.

Individuals on both sides of the affirmative action debate expressed satisfaction with the decision. Wade Henderson, president of the Leadership Conference on Civil and Human Rights, stated: "The educational benefits of diversity are clear. The court's decision reaffirms that it is in our national interest to expand opportunities for everyone."

On the other side of the argument, Edward Blum, the neoconservative American Enterprise Institute fellow who led the legal challenge to UT's policy, said the court had "established exceptionally high hurdles" for universities that wish to continue race-based admissions policies. "This decision begins the restoration of the original color-blind principles to our nation's civil rights laws," Blum said, as quoted by the *Los Angeles Times*.

In writing the majority opinion, Kennedy noted that the ruling by the appeals court in favor of the university "did not hold the University to the demanding burden of strict scrutiny articulated in *Grutter* [*v. Bollinger*] and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (opinion of Powell, J.) Because the Court of Appeals did not apply the correct standard of strict scrutiny, its decision affirming the District Court's grant of summary judgment to the University was incorrect. That decision is vacated, and the case is remanded for further proceedings."

Again referring to *Grutter v. Bollinger* and *Univ. of Cal. v. Bakke*, Kennedy wrote: "*Grutter* made clear that racial 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.'… And *Grutter* endorsed Justice Powell's conclusion in *Bakke* that 'the attainment of a diverse student body … is a constitutionally permissible goal for an institution of higher education.'… Thus, under *Grutter*, a university's 'educational judgment that such diversity is essential to its educational mission is one to which we defer.'"

After conceding that a university — Kennedy makes no distinction between a university that is funded privately or one that is funded with taxpayer dollars — may determine if the attainment of a diverse student body is a legitimate goal to be obtained by extraordinary measures, Kennedy goes on to express some limitations of such policies:

> A university is not permitted to define diversity as "some specified percentage of a particular group merely because of its race or ethnic origin." *Bakke*, supra, at 307 (opinion of Powell, J.) "That would amount to outright racial balancing, which is patently unconstitutional." *Grutter*, supra, at 330. "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"…
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> Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal.

An article in the *Wall Street Journal* quoted Kennedy as stating his view that because racial classifications inherently are "odious to a free people," universities "must prove that the means" they use "to attain diversity are narrowly tailored to that goal." Kennedy continued by writing that UT must demonstrate "that available, workable, race-neutral alternatives do not suffice."

While both opponents and defenders of affirmative action may optimistically take comfort in the "half a loaf" that this latest ruling offers them, like many cases dealing with social issues (e.g., abortion, same-sex marriage, the war on drugs), the battle lines are usually drawn between the socially "liberal" and socially "conservative" sides, rather than between those who are loose constructionists and those who

are strict constructionists ("constitutionalists") when it comes to interpreting the Constitution.

While the majority opinion in this decision, which instructs the lower court to apply "strict scrutiny" in ruling on UT's policies, might be viewed as a step toward the common-sense policy of admitting students based on merit rather than race, from the constitutionalist standpoint, it can hardly be regarded as "conservative."

From a strict constructionist standpoint, *any* involvement by the federal government in affairs that rightfully should come under the jurisdiction of the states is a violation of the Tenth Amendment.

Thomas Jefferson, writing in "Opinion on the Constitutionality of a National Bank" on February 15, 1791, affirmed this point: "I consider the foundation of the [Federal] Constitution as laid on this ground: That 'all powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people.' To take a single step beyond the boundaries thus specifically drawn around the powers of Congress is to take possession of a boundless field of power, no longer susceptible of any definition."

The constitutionalist would say that any federal involvement in education, affirmative action included, goes several steps beyond what is authorized by the Constitution.

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